

SERVED: August 18, 1992

NTSB Order No. EA-3640

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of August, 1992

_____)	
)	
THOMAS C. RICHARDS, Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-9516
v.)	
)	
DAVID WAYNE BAUGHMAN,)	
)	
Respondent.)	
_____)	

ORDER DENYING RECONSIDERATION

Respondent seeks reconsideration of our decision (NTSB Order EA-3563) served May 28, 1992. In that decision, we granted the Administrator's appeal from the law judge's initial decision, and reinstated the Administrator's order. We found that respondent, as non-flying pilot-in-command ("PIC"), violated 14 C.F.R. 91.75(a) and 91.9 in connection with a 1600-foot altitude deviation. Although the deviation most likely was prompted by a faulty autopilot, we concluded that respondent, in relying on the autopilot for altitude control, did not demonstrate the standard of care required of him as PIC. In doing so, we rejected the law judge's finding that respondent had exercised a high degree of care and had done all he could do.

In his petition for reconsideration, respondent argues that our prior decision gave insufficient consideration to the other tasks he was performing at the time -- tasks that allegedly precluded him from cross-checking altitude using the altimeter. Respondent notes that the law judge participated in a simulator demonstration that ostensibly showed how a "spontaneous

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malfunction of the [autopilot] may be undetected for a short period of time while the crew performs other duties necessary for the safe operation of the aircraft." Petition at unnumbered 2.

Respondent contends that, because this demonstration could not be reproduced in the record and the law judge did not discuss it, the Board applied a theoretical analysis of the duties of flight crews. Awareness of the actual procedures allegedly would have resulted in our affirming the initial decision. Respondent requests that we vacate our decision, designate a Board member or members to observe a simulator session recreating the presentation before the law judge, and address the "actual procedures followed in the cockpit" in reaching our decision on appeal.

The procedure suggested by respondent is unnecessary. The Board is well aware of the numerous and complex cockpit duties in a Boeing 737. As we pointed out in our decision, they do not, however, excuse respondent's omission here.

In any case, the petition must also fail as a procedural matter. We noted in our decision (at 4) that respondent's claim that he was especially busy with other duties was not proven in the record. Respondent's suggestion that this Board, acting in its appellate capacity, participate in a flight simulation is clearly intended to fill that void in the record. It is not the proper way of doing so, however.

It was respondent's obligation to include in the hearing record all information he wished considered both by the law judge and in any potential appeal. His petition is a thinly disguised attempt to correct his earlier failure to introduce written information or testimony detailing and illustrating cockpit duties -- evidence that would have been preserved in the record on appeal. As such, the request is unreasonable and inappropriate.¹

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's petition for reconsideration is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

¹This simulation would also not qualify for the new evidence exception to the general rule against reopening the record on appeal. See, e.g., Administrator v. McGee, 4 NTSB 251 (1982) (information that could have been presented at hearing but was not based on counsel's advice it was not needed is not new evidence).